v. *Muller*. It might be argued that as the property of an alien enemy is taken from him and vested in the alien property custodian,[13] that a contract made by an agent in his name is not a contract on behalf of him or for his benefit, but for the benefit of the government. But this is not true in either country, for the property is not permanently taken from the enemy, but merely held for him during the war, and then disposed of as Congress [14] or the King by Order in Council may direct.[15] The alien enemy may or may not receive a penny of it.

The principal case should, therefore, be decided differently if considered solely from the point of view of war legislation in either the United States or in England.

EFFECT OF WAR ON CONTRACTS. — War between states rather than between their subjects, as set forth in Rousseau's "athletic-contest" theory of belligerency,[1] never seemed farther from reality than in the present war, so emphatically a struggle between peoples rather than between princes. In such a contest, whatever may be the amelioration of military practices, the old restrictions upon commercial intercourse persist with undiminished rigor. The most significant effects of war upon contracts are seen in its intrusion as an intervening circumstance making performance impossible, in its prohibition of trading and negotiating with enemies, in its postponing the remedy on executed contracts, and in its suspending or dissolving executory contracts.[2]

The strict rule of the common law is that subsequent impossibility does not dissolve an express unconditional contract.[3] The law, however, mitigates this harsh doctrine by recognizing implied conditions in many contracts where the contrary intention does not clearly appear in the contract.[4] It is a good defense if performance is made illegal by domestic law,[5] but, it seems, not if foreign law prohibits.[6] It has been held that a

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[13] United States Trading with the Enemy Act, 1917, § 6; 5 GEO. V, c. 12.

[14] Act of 1917, § 12.

[15] 5 GEO. V, c. 12, § 5.

[1] See ROUSSEAU, DU CONTRAT SOCIAL, l. 1, c. iv; BORDWELL, LAW OF WAR BETWEEN BELLIGERENTS, 3.

[2] See TROTTER, LAW OF CONTRACT DURING WAR, 6.

[3] Paradine *v.* Jane, Aleyn, 26 (1647). See WALD'S POLLOCK, CONTRACTS, 3 (WILLISTON'S) ed., 527.

[4] Horlock *v.* Beal, [1916] 1 A. C. 486. Lord Wrenbury, 525, makes this statement of the law: "When a contract has been entered into, and by a supervening cause beyond the control of either party, its performance has become impossible, I take the law to be as follows: If a party has expressly contracted to do a lawful act, come what will — if, in other words, he has taken upon himself the risk of such a supervening cause — he is liable if it occurs, because by the very hypothesis he has contracted to be liable. But if he has not expressly so contracted, and from the nature of the contract it appears that the parties from the first must have known that its fulfilment would become impossible if such a supervening cause occurred, then upon such a cause occurring both parties are excused from performance. In that case a condition is implied that if performance becomes impossible the contract shall not remain binding." *Cf.* Tamplin S. S. Co. *v.* Anglo-Mexican, etc. Co., [1916] 2 A. C. 397.

[5] Chicago, etc. Ry. *v.* Hoyt, 149 U. S. 1 (1892); Taylor *v.* Caldwell, 3 B. & S. 826 (1863); *In re* Shipton, Anderson & Co., [1915] 3 K. B. 676.

[6] Tweedie, etc. Co. *v.* J. P. McDonald Co., 114 Fed. 985 (1902).

war between foreign nations, preventing performance of a contract, does not excuse performance.[7] War generally, as an intervening event, is so evidently not within the contemplation of parties that the courts usually find an implied condition to excuse performance. This resulting modification of the rule of *Paradine* v. *Jane* more nearly approaches equitable considerations. The Supreme Court in the recent case of the *Kronprinzessin Cecilie* [8] has shown itself substantially in accord with the liberal position of the House of Lords in *Horlock* v. *Beal*.

The general rule of American and British courts is that contracts made with alien enemies during war are illegal and void.[9] The old common law distinguished between contracts and trading with the enemy, but this distinction is now obsolete.[10] A large part of the law about trading with the enemy was handed down by the early prize courts and belongs to the days when privateering was regular. Being accepted as precedent it has not been swept away. Nations no longer depend upon privateers as a part of their naval establishment. Thus one danger of embarrassment from trading with the enemy has now disappeared. The continental publicists tend to the position that trading is legal after the outbreak of war, unless specially prohibited.[11] Prior to the war German law forbade only trade with the enemy that amounted to treason.[12] The French practice during the Franco-Prussian war [13] indicates an approximation to the English rule of *de facto* prohibition of trading on the outbreak of the war.[14] The common law has been declared and extended by statute during the present war by both the United States [15] and Great Britain.[16]

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[7] Richards *v.* Treschner, 156 N. Y. Supp. 1054 (1915). *Cf.* Graves *v.* Miami S. S. Co., 29 Misc. (N. Y.) 645, 61 N. Y. Supp. 115 (1899).

[8] "Business contracts must be construed with business sense, as they naturally would be understood by intelligent men of affairs." From opinion of Supreme Court, Kronprinzessin Cecilie, North German Lloyd, Clmt. *v.* Guaranty Trust Co., quoted by Conlen, "Impossibilities of Performance of Contracts," 66 U. OF Pa. L. REV. 28.

[9] The Rapid, 8 Cranch (U. S.) 156 (1814); The Sea Lion, 5 Wall. (U. S.) 630 (1866); Potts *v.* Bell, 8 D. & E. 548 (1800); Willison *v.* Patteson, 7 Taunt. 439 (1817) (Immaterial that suit is brought after the war); Bristow *v.* Towers, 6 D. & E. 35 (1794). Cases on this and other points may be found conveniently in SCOTT, CASES ON INTERNATIONAL LAW; TROTTER, LAW OF CONTRACT DURING WAR; and *Id.*, LAW OF CONTRACT DURING WAR, SUPPLEMENT. See WALD'S POLLOCK, CONTRACTS, 3 (WILLISTON'S) ed. 427.

[10] The Anna Catharina, 4 C. Rob. 107 (1802).

[11] For summary of the conflicting views, see PHILLIPSON, EFFECT OF WAR ON CONTRACTS, 53; 3 OPPENHEIM, INTERNATIONAL LAW, 2 ed., § 101; and 4 HOLTZENDORFF, HANDBUCH DES VÖLKERRECHTS, § 87. See also 2 RIVIER, PRINCIPES DU DROIT DES GENS, 231.

[12] See WESTLAKE, INTERNATIONAL LAW, Pt. II, 38. For a consideration of the principal provisions of German ordinances as to trading and contracts with the enemy see a series of articles by [C. H. Huberich] and Richard King in 59 SOLICITOR'S JOURNAL (London), 22, 39, 55, 70, 126, 378, 394, *et seq.* See also King, "The German Enemy Contract Annulment Ordinance," 2 INTERNATIONAL LAW NOTES (London), 5, and SPEYER AND HUBERICH, "De Noodwengeving van Let Duitsche Rijk" (THE HAGUE, 1915). Quoted from note, C. H. Huberich, "German Laws Relating to Payments to Alien Enemies," 17 COL. L. REV. 653.

[13] See DESPAGNET, COURS DU DROIT INTERNATIONAL PUBLIC, 540.

[14] See BENTWICH, LAW OF PRIVATE PROPERTY IN WAR, 48; 3 PHILLIMORE, INTERNATIONAL LAW, 3 ed., 116 *et seq.*

[15] Trading with the Enemy Act, October 6, 1917, U. S. COMP. STAT., § 3115¼, 244 Fed. 437. The prohibitions of this statute extend, in part at least, to enemy allies.

[16] Trading with the Enemy Amendment Act, 1916, 5 & 6 GEO. V, c. 105. The Board of Trade is given comprehensive powers over contracts. § 2. "When it appears

So far the restrictions have been applied only to financial and commercial contracts, though the language of the prohibitions, taken literally, is broad enough to cover even a promise to marry an enemy alien. The Anglo-American law has recognized a few exceptions, notably in the case of licensed trade.[17] Less important are the relaxations in favor of ransom bills [18] and contracts of necessity, especially by prisoners of war.[19] Following the Civil War certain American courts inclined to a rule which would prohibit only intercourse shown to be inconsistent with a state of war,[20] but British opinion has not followed the American suggestion, and there seems little chance of any indulgence during the existing war.

If a contract made before the war is executed, that is, wholly performed on one side, the remedy is suspended as to the alien enemy during the continuance of the war.[21] This rule applies particularly to cases which only require the payment of money. The alien enemy has no standing in an American or British court, but the American courts, especially, regard the plea of alien enemy with scant favor.[22] The fundamental principle is that the alien may not be an *actor*.[23] Recovery will be allowed *against* the alien if he has funds that may be attached. The rule of suspension is solely to prevent advantage to the enemy. The running of the Statute of Limitations is suspended during the period of the war.[24] Interest is generally not recoverable after the debt is due and payable, if war is going on.[25] It has been strongly urged that the whole rule as to the suspension of remedy on an executed contract has been changed by the Fourth Convention of the Hague Conference of 1907.[26] Certainly this was the intention of the German delegates who introduced the article, and their position has respectable support. The English view is that the subsection in controversy merely prohibits the military authorities in command of occupied territory from preventing access to the civil courts

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to the Board of Trade that a contract entered into before or during the war with an enemy . . . is injurious to the public interest, the Board may by order cancel or determine such contract either conditionally or upon such conditions as the Board may think fit." See also Trading with the Enemy Proclamation, No. 2, of September 9, 1914.

[17] The Hoop, 1 C. Rob. 196 (1799); Usparicha *v.* Noble, 13 East 332 (1811); Kensington *v.* Inglis, 8 East 273 (1807). See United States *v.* One Hundred Barrels of Cement, 27 Fed. Cas. 292 (1862).

[18] Goodrich *v.* Gordon, 15 Johns. (N. Y.) 6 (1818); Ricord *v.* Bettenhand, 3 Burr. 1734 (1765). By statute, 22 GEO. III, c. 25 (1792), ransom contracts were made illegal and void. Under section 45 of the Naval Prize Act, 1864, 27 & 28 VICT., c. 25, however, the Crown may, by Order in Council, allow British subjects to ransom their property. See TROTTER, LAW OF CONTRACT DURING WAR, SUPPLEMENT, 20.

[19] Antoine *v.* Morshead, 6 Taunt. 236 (1815).

[20] Kershaw *v.* Kelsey, 100 Mass. 561 (1868). (Lease of plantation made during war held valid.) The famous opinion of Mr. Justice Gray contains an exhaustive examination of authorities.

[21] *Ex parte* Boussmaker, 13 Ves. 71 (1806); Alcinous *v.* Nigreu, 4 E. & B. 217 (1854).

[22] See C. M. Picciotto, "Alien Enemies in English Law," 27 YALE L. J. 167.

[23] McVeigh *v.* United States, 11 Wall. (U. S.) 259 (1870). See also 31 HARV. L. REV. 470.

[24] Hangar *v.* Abbott, 6 Wall. (U. S.) 532 (1867). There are English *dicta*, *contra*.

[25] Bean *v.* Chapman, 62 Ala. 58 (1878).

[26] Fourth Hague Convention, 1907, XXIII (*h*). It is hereby prohibited "to declare abolished, suspended, or inadmissible the right of the subjects of the hostile party to institute legal proceedings." The general subject of the Fourth Convention is Hostilities. See HIGGINS, HAGUE PEACE CONFERENCES, 263 *et seq.*

on the part of residents of that territory. The British opinion is probably shared in the United States. The old rule will doubtless stand throughout the war.

Executory contracts, that is, contracts wholly unperformed, or in which something remains to be done, if made before the war, are suspended or not, according to the circumstances. As Mr. Justice Gray said in *Kershaw* v. *Kelsey*, modern commercial conditions demand that war shall not interfere with the incorporeal, any more than with the corporeal, private rights of belligerent subjects, save where the upholding of the right would add to the security or strength of the enemy during the contest. It is fundamental that contracts involving dealing with the enemy are dissolved,[27] unless the government waives its right in the premises.[28] Even a contract with a neutral is dissolved if it involves trading with the enemy.[29] The principles of equity determine whether many contracts and relationships shall be deemed abrogated or suspended. Thus partnerships are generally dissolved by war,[30] while mortgages are suspended.[31] The circumstances of the particular case will determine whether an agency continues during the war.[32] If time is of the essence, a contract is dissolved.[33] If postponement of performance involves altering the contract itself, the contract is dissolved.[34] It is not true that *inter arma silent leges*, but it is undeniable that a long and bitter war makes for greater severity, even by the courts, in considering the interests of alien enemies. Particularly in case of contracts of affreightment and charter-parties, British courts are inclined to strictness in determining the rights of German charterers. The recent dissolution of a charter-party by the Court of King's Bench in the case of *Clapham S. S. Co.* v. *Handels-en-Transport-Maatschappij Vulcaan*,[35] notwithstanding a clause of suspension in the contract, is only a stern application of the rule that no contract shall continue if it makes the enemy a more powerful antagonist. What one finds to deplore is the tendency to consider present enemies as foes *in perpetuo*, and to overlook that the prospective advantage to the defendant after the war will benefit an alien friend, not an alien enemy.

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[27] Zinc Corporation *v.* Hirsch, [1916] 1 K. B. 541. *Cf.* Furtado *v.* Rogers, 3 B. & P. 191 (1862). See SCHUSTER, EFFECT OF WAR AND MORATORIUM ON COMMERCIAL TRANSACTIONS, 9.

[28] Clementson *v.* Blessig, 11 H. & G. 135 (1855).

[29] Esposito *v.* Bowden, 7 E. & B. 763 (1857). *Cf.* Duncan, Fox & Co. *v.* Schrempft & Bonke, [1915], 1 K. B. 365.

[30] Matthews *v.* M'Stea, 91 U. S. 7 (1875); Griswold *v.* Waddington, 16 Johns. (N. Y.) 438 (1819).

[31] Dorsey *v.* Dorsey, 30 Md. 522 (1869).

[32] Williams *v.* Paine, 169 U. S. 55 (1898); N. Y. L. Ins. Co. *v.* Davis, 95 U. S. 425 (1877).

[33] N. Y. L. Ins. Co. *v.* Statham, 93 U. S. 24 (1876). For a summary of the insurance cases see WAMBAUGH, CASES ON INSURANCE, 651, note; and SCOTT, CASES ON INTERNATIONAL LAW, 516, note. Marine-insurance policies and fire-insurance policies are generally held good against all losses except those due to the hostile acts of the forces of the country of the insurer. The problem as to the extent to which war affects the obligations on a life-insurance policy is complicated by the different views as to the nature of the contract of assurance.

[34] Distington, etc. Iron Co. *v.* Possehl & Co., [1916] 1 K. B. 811.

[35] [1917] 2 K. B. 639. See Recent Cases, page 661.